APPENDIX A

Docket No. 55371—Agenda 13—January 1982.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant,

v.

JAMES D. COLE, Sr., *et al.*, Appellees.

JUSTICE MORAN delivered the opinion of the court:

On January 15, 1980, a three-count indictment was returned against defendants, James D. Cole, Sr., and Jame D. Cole, Jr. Count I of the indictment charged defendants with solicitation (to commit murder) in that they *requested* William Haley, a special agent for the Department of Law Enforcement, to murder Robert H. Jones. Count II of the indictment charged defendants with solicitation (to commit murder) in that they *encouraged* Haley to murder Jones. Count III charged defendants with conspiracy (to commit murder). Following a jury trial in the circuit court of Peoria County, the defendants were acquitted on counts I and III. The jury was unable to reach a verdict on count II, which charged defendants with solicitation by encouragement. A mistrial was therefore declared as to count II. After denying defendants' motion to dismiss that count, the trial court ordered a second trial. Following a second jury trial, defendants were convicted, and each was sentenced to a five-year prison term. The appellate court reversed the judgments of conviction, holding that defendants' second solicitation trial violated the double-jeopardy provisions of our Federal and State constitutions. 98 Ill. App. 3d 309.

This review presents one issue: Did defendants' second trial for solicitation (to commit murder) by encouraging Haley to murder Jones violate the double jeopardy provisions of the United States and Illinois constitutions.

Both the fifth amendment to the United States Constitution and article I, section 10, of the Illinois Constitution protect persons from being placed twice in jeopardy for the same offense. In addition, section 3—4(a) of the Criminal Code of 1961 (Code) (Ill. Rev. State. 1979, ch. 38, par. 3—4(a)) provides:

> "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction."

Section 8—1 of the Code (Ill. Rev. Stat. 1979, ch. 38, par. 8—1(a)) provides:

> "Solicitation.
>
> (a) Elements of the offense.
>
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

The State concedes that there is only one crime of solicitation. It argues, however, that acquittal of solicitation by *requesting* another to commit an offense (count I) does not bar reprosecution for solicitation by *encouraging* another to commit an offense (count II) when the jury, in the first trial, was unable to reach a verdict on the latter count. Defendants argue that their acquittal on count I constituted an acquittal of the entire solicitation offense, thereby barring their reprosecution under any theory of solicitation.

We first note the well-established principle that a mistrial carries different double-jeopardy ramifications than an acquittal or, for that matter, in some instances, a dismissal. As the United

States Supreme Court stated in *Lee* v. *United States* (1977), 432 U.S. 23, 29-30, 53 L. Ed. 2d 80, 87, 97 S. Ct. 2141, 2145:

> "[W]e recognize [in *United States* v. *Jenkins* (1975), 420 U.S. 358, 365 n.7, 43 L. Ed. 2d 250, 256 n.7, 95 S. Ct. 1006, 1011 n.7] that it was 'of critical importance' that the proceedings in the trial court had terminated 'in the defendant's favor' rather than in a mistrial.***
>
> *** The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, see *United States* v. *Jorn*, 400 U.S. 470, 476, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (plurality opinion), while a dismissal may or may not do so."

It is also well established that a court may properly declare a mistrial and discharge a jury when it is apparent the jury is hopelessly deadlocked *(People* v. *Bean* (1976), 64 Ill. 2d 123, 127-28 citing *People* v. *Mays* (1962), 23 Ill. 2d 520, 524) and that, in the absence of an abuse of discretion by the trial court when it discharges a jury because of its failure to reach a verdict, the constitutional prohibition against double jeopardy does not bar a new trial. *(People* v. *Bean* (1976), 64 Ill. 2d 123, 128; *People* v. *Nilsson* (1970), 44 Ill. 2d 244, 246. See *United States* v. *Jorn* (1971), 400 U.S. 470, 27 L. Ed. 2d 543, 91 S. Ct. 547; *United States* v. *Perez* (1824), 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165.) Here, there is no claim that the trial court abused its discretion by discharging the jury and declaring a mistrial on count II. Thus, a reprosecution on that count would not normally be barred by the constitution prohibition against double jeopardy. The question then becomes whether defendants' acquittal on count I based on another theory of the same offense, transcends the general rule allowing reprosecution under the same indictment after a mistrial has been declared.

In support of their argument that reprosecution on count II is barred, defendants cite *People* v. *Allen* (1974), 56 Ill. 2d 536, *cert. denied* (1974), 419 U.S. 865, 52 L. Ed. 102, 95 S. Ct. 120, the case upon which the appellate court principally relied in reaching its decision. In *Allen,* the defendant was charged by indictment with two counts of murder under sections 9—1(a)(1) and (a)(2) of the Code (Ill Rev. Stat. 1967, ch. 38, pars. 9—1(a)(1), (a)(2)). The trial court instructed the jury under sections 9—1(a)(1) and (a)(2), as well as under section 9—1(a)(3) for felony murder, a theory under which defendant had not been charged. The defendant was convicted of murder. He appealed, contending that felony murder was a distinct crime from murder as defined in sections 9—1(a)(1) and (a)(2) of the Code and that it was a denial of due process for the court to instruct the jury on an offense with which he had not been charged. The court rejected this argument and found that defendant was aware of the State's felony-murder theory and was not misled in preparing a defense. This court also stated:

> "Under section 9—1 there is but one crime of murder, not three separate and distinct offenses as the defendant's argument assumes. Each of subparagraphs (1), (2) and (3) under section 9—1(a) describes the mental state or the conduct of the defendant which must accompany the acts which cause the death. *If the defenant were charged with murder under subparagraph (a)(1) and acquitted, he could not again be charged and tried for murder of the same individual under subparagraph (a)(2) or (a)(3).* Thus, there is no possibility that the defendant in this case could have been twice put in jeopardy. Also, the provision of our statute covering the effect of a former prosecution (Ill. Rev. Stat. 1967, ch. 38, par. 3—4) prohibits a subsequent prosecution of the defendant under such circumstances." (Emphasis added.) (56 Ill. 2d 536, 543.)

See also *United States ex rel. Harris* v. *Illinois* (7th Cir. 1972), 457 F.2d 191, 197, *cert. denied* (1972), 409 U.S. 860, 34 L. Ed. 2d 106, 93 S. Ct. 147; *People* v. *Johnson* (1976), 65 Ill. 2d 332, 337-39; *People* v. *Rosochacki* (1969), 41 Ill. 2d 483, 491-92.

We find *Allen* inapplicable. In that case, there was a single prosecution in which defendant was found guilty under a theory not alleged in the indictment. The court referred to double jeopardy in finding the variance between the charge alleged and the proof adduced at trial to be nonfatal.

We agree that the State cannot charge a defendant under one theory and, following an acquittal under that theory, subsequently recharge and prosecute under another theory for the same offense. However, that is not what occurred in the instant case. In contrast to the hypothetical alluded to by the above-quoted language in *Allen*, this case does not involve a reprosecution based upon a theory of the same offense that was not previously charged. Request and encouragement are two disjunctive methods by which the offense of solicitation can be committed and reflect the legislature's intent to include varying degrees of involvement on the part of the solicitor. Here, the State charged defendants with solicitation under two theories, each brought under a separate count. The jury acquitted defendants of only solicitation by request. Its inability to reach a verdict as to solicitation by encouragement is not tantamount to an acquittal under such theory.

To allow the acquittal under count I to bar retrial under count II would, in effect, create an anomaly. On one hand, reprosecution would be precluded when two theories of an offense are split into two counts, with one count resulting in acquittal and the other in mistrial because of the jury's inability to reach a verdict. Yet, if, in the instant case, solicitation by encouragement and solicitation by request were charged in the same

count, and had the jury been unable to reach a decision under the encouragement theory, it is reasonable to assume that the jury would have been unable to return a verdict on the entire count. In that event, the declaration of a mistrial would have resulted in a reprosecution without any double jeopardy violations. Under the circumstances of this case, we hold the reprosecution of defendants for solicitation (to commit murder) by encouraging agent Haley to murder Robert Jones was not barred by the constitutional or statutory prohibitions against double jeopardy.

Accordingly, the judgment of the appellate court is reversed and the judgments of the circuit court of Peoria County following defendants' second trial are affirmed.

Appellate court reversed;
circuit court affirmed.

APPENDIX B

Illinois Supreme Court
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Springfield, Ill. 62706
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H. Wayne Rusell
Clerk

May 27, 1982

Mr. Robert H. Rice
Attorney at Law
110 E. Lincoln St.
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No. 55371 — People State of Illinois, appellant, v. James D. Cole, Sr., et al., appellees. Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ H. Wayne Russell
Clerk of the Supreme Court

APPENDIX C

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**James D. COLE, Sr. and James D. Cole,
Jr., Defendants-Appellants.**

No. 80-379.

Appellate Court of Illinois,
Third District.

July 23, 1981.

Defendants were convicted before the Circuit Court, Tenth Judicial Circuit, Peoria County, Calvin R. Stone, J., of solicitation by encouragement to commit murder, following mistrial on such charge in first trial of defendants, which also resulted in acquittal on charges of solicitation by request to commit murder and of conspiracy to commit murder. Both defendants appealed. The Appellate Court, Barry, J., held that solicitation statute encompasses one, and only one, offense, which can be committed in any one of three ways; accordingly, when defendants were acquitted of crime of solicitation under a request theory, double jeopardy provisions of the Federal and State Constitutions prohibited their retrial for same crime under an encouragement theory.

Reversed.

1. Criminal Law (key) 45

Statute pertaining to crime of solicitation encompasses one, and only one offense, which can be committed in any one of three ways: by commanding, requesting, or encouraging another to commit an offense. S.H.A. ch. 38, § 8-1(a).

2. Criminal Law (key) 45

The words "commands, requests or encourages" in solicitation statute merely state within one statutory section the three alternative ways in which the crime of solicitation can be committed, and reflect the legislature's intention to include varying degrees of involvement on part of solicitor within one encompassing inchoate offense. S.H.A. ch. 38, § 8-1(a).

3. Criminal Law (key) 206(1)

It is within discretion of state's attorneys to charge a defendant with three separate methods of solicitation under each of the three theories of prosecution set out in solicitation statute, a conviction or acquittal under any one theory bars further prosecution under any of the others when all counts are based upon same set of facts. U.S.C.A.Const. Amend. 5; S.H.A.Const. Art. 1, § 10; S.H.A. ch. 38, § 8-1(a).

4. Criminal Law (key) 200(1)

Where defendants were acquitted of crime of solicitation under a request theory, double jeopardy provisions of Federal and State Constitutions prohibited their retrial for same crime under an encouragement theory. U.S.C.A.Const. Amend. 5; S.H.A.Const. Art. 1, § 10; S.H.A. ch. 38, § 8-1(a).

Robert H. Rice, Stephen R. Rice and Richard Aguirre, Rice, Durso, Rice & Aguirre, Belleville, for defendants-appellants.

Terry A. Mertel, John X. Breslin, State's Attys., Appellate Service Commission, Ottawa, John A. Barra, State's Atty., Peoria, for plaintiff-appellee.

BARRY, Justice.

On January 15, 1980, the grand jury of Peoria County returned a three count indictment against defendants James D. Cole, Sr., and James D. Cole, Jr. Count I of the indictment charged the defendants with the crime of solicitation (to commit murder) in that they requested William Haley, a special agent for the Illinois Department of Law Enforcement, to murder attorney Robert H. Jones (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)). Count II of the indictment charged the defendants with the crime of solicitation (to commit murder) in that they encouraged agent Haley to murder Jones (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)). Count III charged the defendants with conspiracy (to commit murder) (Ill.Rev.Stat.1979, ch. 38, par. 8-2(a)). Following a jury trial in the circuit court of Peoria County, the defendants were acquitted on counts I and III, *i. e.*, the solicitation by request charge and the conspiracy charge. The jury was, however, unable to reach a verdict on the remaining solicitation count, count II, which charged the defendants with solicitation by encouragement. A mistrial was declared as to count II and, after denying defendants' motion to dismiss that count, the trial court ordered a second trial on count II. Following the second jury trial, both defendants were convicted. Each was subsequently sentenced to the Department of Corrections for a term of five (5) years. Bond was denied, and defendants have since been incarcerated.

On appeal the defendants raise only one issue for our consideration: Did their second trial on count II of the indictment violate the double jeopardy provisions of both the United States and Illinois Constitutions (U.S.Const. amend V; Ill.Const. of 1970, Art. I, sec. 10). "A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution * * [r]esulted in either a conviction or an acquittal * * *." (Ill.Rev.Stat.1979, ch. 38, par. 3-4(a)(1).) The defendants contend that the Illinois solicita-

tion statute, which provides that "[a] person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense" (Ill.Rev.Stat.1979, ch. 38, par. 8-1(a)), defines but one offense which can be committed in any one of three ways. Consequently, they argue, when they were acquitted of the crime of solicitation by request (count I), they could not be retried for the same act of solicitation under a different charge (solicitation by encouragement), because in so doing they would be placed twice in jeopardy for the same offense.

[1-3] The defendants' position is not without merit, and is supported by the decision of our Supreme Court in *People* v. *Allen* (1974), 56 Ill.2d 536, 309 N.E.2d 544, *cert. denied* 419 U.S. 865, 95 S.Ct. 120, 42 L.Ed.2d 102. In *Allen*, the defendant was charged by indictment with two counts of murder (Ill.Rev.Stat.1967, ch. 38, pars. 9-1(a)(1), (2)). Although he was not charged with felony murder (Ill.Rev.Stat.1967, ch. 38, par. 9-1(a)(3)), the trial court instructed the jury on this theory. On appeal from his conviction, the defendant contended that because felony murder is a distinct crime the trial court violated his due process rights by instructing the jury on an offense for which he had not been charged. The Supreme Court, in rejecting this argument, made the following statements which are highly pertinent to the instant case:

> "Under section 9-1 there is but one crime of murder, not three separate and distinct offenses as the defendant's argument assumes. Each of subparagraphs (1), (2) and (3) under section 9-1(a) describes the mental state or the conduct of the defendnt which must accompany the acts which cause the death. If the defendant were charged with murder under subparagraph (a)(1) and acquitted, he could not again be charged and tried for murder of the same individual under subparagraph (a)(2) or (a)(3). Thus, there is

> no possibility that the defendant in this case could have been twice put in jeopardy. Also, the provision of our statute covering the effect of a former prosecution (Ill.Rev.Stat.1967, ch. 38, par. 3-4) prohibits a subsequent prosecution of the defendant under such circumstances." 56 Ill.2d at 543, 309 N.E.2d at 547-48.

(*Accord, People* v. *Wilson* (1978) 61 Ill.App.3d 1029, 18 Ill.Dec. 914, 378 N.E.2d 378.) Certainly, if subsections (a)(1), (a)(2), and (a)(3) of the Illinois murder statute do not define separate and distinct offenses, the words "commands, requests or encourages" do not constitute separate and distinct crimes of solicitation. By analogy, *Allen* clearly dictates that there is but one offense of solicitation under section 8-1(a) of the Criminal Code (*See* Ill.Ann.Stat. ch. 38, par. 8-1, Committee Comments—1961, at 454-55 (Smith-Hurd 1972)). The words "commands, requests or encourages" merely state within one statutory section the three alternative ways in which the crime of solicitation can be committed, and reflect the legislature's intention to include varying degrees of involvement on the part of the solicitor within one encompassing inchoate offense (*See* Ill.Rev. Stat.1979, ch. 38, par. 2-20). Although we agree with the State that it is within the discretion of State's attorneys to charge a defendant with three separate methods of solicitation under each of the three theories of prosecution (*See, e. g., People* v. *Corbetto* (1975), 32 Ill.App.3d 696, 336 N.E.2d 505), once the prosecution has made its choice, a conviction or acquittal under any one theory bars further prosecution under any of the others when all counts are based upon the same set of facts. Such is the situation in the case at bar.

In holding that section 8-1(a) of the Criminal Code states only one offense, we necessarily reject the State's contention that each "theory" under which the crime of solicitation can be perpetrated constitutes a separate offense. The State argues that

because solicitation by request requires different proof than solicitation by encouragment (in that with the former the State would be required to prove that the idea of murdering Jones originated with the defendants, while with the latter, the State would be required to prove the idea originated with Haley, the "hit man"), solicitation by request and solicitation by encouragement are two distinct and separable offenses.[1] We find this argument to be unconvincing for several reasons. First, a similar analysis could be made of the Illinois murder statute in support of a contention that subsections (a)(1), (a)(2), and (a)(3) of that statute constitute separate offenses (Ill.Rev.Stat.1979, ch. 38, pars. 9-1(a)(1), (2), (3)). In light of *Allen* such an analysis must fail. Second, if the State were required to prove that the idea of murdering Jones originated with special agent Haley in order to prove that the defendant committed the crime of solicitation by encouragement, it would simultaneously be proving the defense of entrapment. It is well settled that for an entrapment to exist "the idea of committing the offense must originate not with the suspect but with the enforcement authorities." (*People* v. *Fisher* 1979), 74 Ill.App.3d 330, 334, 30 Ill.Dec. 210, 214, 392 N.E.2d 974, 978.) The State's effort to require different proofs for each of the theories under which the crime of solicitation can be committed leads to an incongruous situation, *i. e.*, the proof of a crime being identical with the proof of a defense which negates criminal liability, exposing the inherent weakness of the State's position. Further it would appear that to command or encourage the commission of a crime would necessarily include to "request", the State's proof of which failed by virtue of the jury's acquittal on count I.

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[1] "The test of the identity of offenses is whether each statutory provision requires the proof of an additional fact which the other does not." *People* v. *Goolsby* (1979), 70 Ill.App.3d 832, 837, 26 Ill.Dec. 893, 896, 388 N.E.2d 894, 897, citing *Blockburger* v. *United States* (1932), 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

[4] In summation, we believe that section 8-1(a) of the Criminal Code encompasses one, and only one, offense: that of solicitation. By the very terms of the statute, the crime of solicitation can be committed in any one of three ways: by commanding, requesting, or encouraging another to commit an offense. Those three possible descriptions of the same activity do not constitute separate and distinct offenses or crimes when based upon one incident. Rather, by our view, the statute offers the State several methods of charging and prosecuting for the same offense. Accordingly, when the defendants were acquitted of the crime of solicitation under a request theory, the double jeopardy provisions of our federal and state constitutions prohibited their retrial for the same crime under a different theory (encouragement). The defendants' second soliciation trial was clearly in contravention of the defendants' right to be free from double jeopardy, and as a consequence the convictions which followed that second trial must be reversed.

For these reasons, we reverse the judgments of the circuit court of Peoria County.

Judgments reversed.

SCOTT, P. J., and HEIPLE, J., concur.